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COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Fifty-fourth session

SUMMARY RECORD OF THE 1323rd MEETING

Held at the Palais des Nations, Geneva,
on Friday, 12 March 1999, at 3 p.m.

Chairman: Mr. ABOUL-NASR

later: Mr. SHERIFIS

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Australia

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GE.99-40873 (E)

The meeting was called to order at 3.10 p.m.

PREVENTION OF RACIAL DISCRIMINATION, INCLUDING EARLY WARNING MEASURES AND URGENT ACTION PROCEDURES (agenda item 3) (continued)

Australia (CERD/C/347)

1. At the invitation of the Chairman, Mr. Goledzinowski, Mr. Orr and Ms. Bicket (Australia) took places at the Committee table.

2. Mr. GOLEDZINOWSKI (Australia) referred the Committee to the announcement of the appointment of William Jonas as the Aboriginal and Torres Strait Islander Social Justice Commissioner with the Human Rights and Equal Opportunity Commission for a period of five years starting on 6 April.

3. In 1998, his Government had invited the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to visit Australia. Originally planned for May 1998, the visit had had to be postponed, but since then, the Special Rapporteur had indicated that, given certain positive developments in Australia, to which he had also referred in his report to the General Assembly in 1998, a visit to Australia was currently of low priority and was unlikely in 1999.

4. Mr. ORR (Australia) recalled that in 1992, the High Court of Australia had handed down its Mabo decision, which for the first time had recognized the traditional land rights, known as native title rights, of Australia's indigenous people. From the time of British settlement in 1788 until the Mabo decision, common law had held that Australia's indigenous people had no such rights. Australia had been said to be terra nullius, i.e. land belonging to no one. The Mabo decision had overturned that great injustice. The Court's decision had to a large extent been based on international legal thinking, including on racial discrimination. But although the Court had held that native title rights had survived the acquisition of sovereignty by the British, it had also found that native title had been extinguished during the gradual development of the colony by the construction of public works, such as roads and schools, and by grants to settlers, such as freehold and leasehold grants. As the judges in the Mabo case had noted, the dispossession of Australia's indigenous people and the extinguishment of their rights had underwritten the development of the nation.

5. The Native Title Act, passed by the Commonwealth Parliament in 1993, had sought to incorporate the law of native title into Australian law. It had drawn a distinction between the past and the future: for the past, it had sought to validate past acts of Governments which might have been invalid because of the existence of native title, in particular acts which had taken place after 1975, when the Racial Discrimination Act had been passed to implement of Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. Tragic as the past dispossession of Australia's indigenous people had been, in the Government's view it was not possible to undo those events. Rather, the question of their validity had been put aside, albeit with compensation payable for the effect of that validation on any native title rights. At the same time, the Native

Title Act had significantly restricted the future extinguishment of native title. The so-called "freehold test" had been introduced, freehold being the highest form of title to land under Australian law, and to a large extent the Native Title Act had provided that native title-holders should be accorded the same rights as freeholders.

6. The Act had created a special "right to negotiate", referred to during the debate as a special measure, although some regarded it as a provision of substantive equality for native title-holders. That was a procedure which was not available to other landholders in Australia and had to do with mining or compulsory acquisition of native title land. It had provided for notification of native title-holders and others, good-faith negotiation, a determination by an independent specialist body, the National Native Title Tribunal, and a limited overriding power for ministers. The right to negotiate had been open not only to people who had a determined claim to native title, but also to credible claimants, as a response to the problem that, since recognition of native title had come very late, it had been unclear where native title had existed and who had held it. The Act had introduced a process for obtaining a determination of native title from a special body, the National Native Title Tribunal, and the Federal Court, placing emphasis on mediation in resolving native title disputes. It had also established Aboriginal and Torres Strait Islander representative bodies to assist persons in making their claims to native title; those bodies were funded. Finally, the Act had set up a Land Fund, which would grow to a guaranteed capital base of 1.3 billion Australian dollars, to enable indigenous people who had been dispossessed and whose native title rights had been extinguished to purchase land.

7. On the basis of the Mabo decision and the Native Title Act, it had been estimated that about 39 per cent of Australia - i.e. vacant Crown land or land in respect of which there had been no other significant interests - could be claimed under native title, the assumption being that native title might be equivalent in such cases to ownership of the land. But it had also been assumed that in about 60 per cent of Australia, native title could not be obtained or claimed, because it had been extinguished by past acts of government over the 200 years of colonization.

8. The Wik decision, handed down by the High Court in 1996, concerned pastoral leases, which were a type of grant made by Governments to third parties allowing them to carry on pasturing and, in some cases, agricultural and other primary-production activities. In that decision, the High Court had found that the grant of a pastoral lease in the past had not necessarily extinguished native title rights to the land concerned. Instead, native title-holders and pastoral lessees could coexist on pastoral lease land. That decision had raised a number of issues. Firstly, pastoral leases concerned about 40 per cent of Australian land. Therefore, added to the other 39 per cent, native title claims could be made to about 79 per cent of Australia. Secondly, on pastoral lease land, it was clear that native title might not amount to full ownership of that land, because the native title owners shared the land with the pastoral lessees. There were two coexisting rights, neither of which amounted to full ownership. Thirdly, although the decision had established basic principles, it had not dealt in detail with the relationship between the native title-holders and the pastoral lessees on

pastoral lease land, which had remained unclear. Those issues had had to be addressed, as had a range of other questions that had arisen over the several years during which the Native Title Act had been in force.

9. The Native Title Amendment Bill had consequently been proposed by the Government to deal with issues raised by the Wik decision and in connection with the implementation of the Native Title Act. The passage of the Native Title Amendment Act had been controversial. There had been extensive consultation with stakeholders, and in the course of the parliamentary debate the Government had accepted many changes, some of which had been beneficial to indigenous interests. During the drafting of the Native Title Amendment Act, Australia had been alive to its obligations under the Convention.

10. The Native Title Amendment Act adopted in July 1998 had its own validation regime. Prior to the Wik decision, many State, Territory and, to some extent, Commonwealth Governments had assumed that native title to pastoral lease land had not existed. The Commonwealth Government had regarded that assumption as legitimate, because it was based on statements by the High Court, the Federal Court and the National Native Title Tribunal, and on the Native Title Act itself, debate on the legislation and other sources. Pursuant to the Wik decision, those statements had proved to be false, but the Government's position had been that the remedy had not been to invalidate grants made to persons on the basis of such a false assumption or to try to undo past events, but to validate a limited range of acts which had occurred in the period between the entry into force of the Native Title Act and the Wik decision, to offer compensation to native title-holders if their rights had been affected by that validation, to provide a measure of notification and to allow for some agreements to be reached on compensation. The validation regime under the Native Title Amendment Act was very limited, much more so than in the Native Title Act itself, essentially dealing as it did with grants of mining leases for pastoral lease land, and it was unlikely that it would extinguish any native title rights. In the Government's view, the validation regime had a legitimate object, was not arbitrary and had minimal impact on native title rights.

11. The second point in the Native Title Amendment Act worth noting was the confirmation of the extinguishment regime. The Government's policy had been to bring greater certainty to those areas in which native title had been extinguished in the past and those in which native title could continue to exist and could be claimed. The implementation of that policy would avoid costly, divisive litigation which on the basis of common law principles would not deliver benefits to native title-holders. The determinations made as to which areas and types of grants should be confirmed to extinguished native title had been made on the basis of the Wik and Mabo decisions.

12. The Commonwealth Government had rejected many proposals from States and Territories to confirm extinguishment in other areas. In particular, it had rejected proposals that it should confirm the wholesale extinguishment of native title on pastoral lease land, arguing that it would be contrary to the Wik decision and to its obligations under the Convention and the Racial Discrimination Act. The confirmation regime implemented in the Native Title Amendment Act meant that 79 per cent of Australia could be claimed by native

title-holders. If in the future it became clear that inappropriate grants or actions had been included in the confirmation regime, the Act allowed them to be removed from the regime.

13. The Commonwealth Government had itself proposed amendments to the Native Title Act incorporating parliamentary opposition and indigenous concerns about some aspects originally included in the confirmation regime: the position of national parks and Crown-to-Crown grants, for instance, was left to common law. Further, the amended Native Title Act included provisions which allowed native title claims to be made to land where there had been extinguishment once the extinguishing act had disappeared or been done away with, for example in the case of a road or a school that was no longer needed. Similarly, section 47 (b) of the Native Title Amendment Act allowed native title to be claimed where freehold or leasehold grants had been made which might have extinguished native title, but where those grants no longer existed. That position was much more beneficial to native title-holders than the general common law.

14. Lastly, the Government had retained the Land Fund, which enabled indigenous people to purchase land to which they had a special attachment but where there had been extinguishment of native title.

15. The Native Title Amendment Act recognized that native title issues should be resolved not by adversarial litigation but by agreements, and contained many provisions for facilitating agreements between native title-holders and farmers and pastoralists, miners and Governments.

16. In response to issues left unresolved by the Wik decision, the Native Title Amendment Act further provided basic rules on the relationship between native title-holders and pastoral lessees on pastoral lease land. In so doing, the Government sought to strike a balance between the two sets of rights. Its policy was that henceforth the agreement provisions in the Native Title Amendment Act should be used by pastoral lessees and native title-holders to establish the basis for their coexisting rights.

17. When the Act had been passed, the assumption had been that native title would exist chiefly on vacant Crown land where native title rights would amount to full ownership, and the right to negotiate had been developed in that context. The Government believed that the full right to negotiate was not necessarily appropriate where native title was only a coexisting right. It had been suggested by some that the Act allowed for the full removal of all native title rights with regard to mining and compulsory acquisition on pastoral lease land. That was not so: although the Act had been passed in 1998, the full right to negotiate continued in many cases to exist for pastoral lease land. But the Act allowed States and Territories to introduce alternative negotiation regimes, in particular for pastoral lease land, which must meet certain criteria. As originally proposed by the Government, the Bill had stipulated that States and Territories should be able to introduce regimes which gave native title-holders on pastoral lease land the same rights as pastoral lessees. However, the Government had eventually changed its position to allow for the unique features of native title and the fact that the interests and rights of native title-holders were not the same as those of pastoral lessees. Hence, section 43 of the amended Act contained a checklist

of criteria that States and Territories must meet to replace the right to negotiate on pastoral lease land with their own regime. Those requirements included notification of native title-holders, representative bodies and claimants, an opportunity to contest the mining or compulsory acquisition, the possibility of consultation, in particular to minimize the effect of the mine on native title rights, and a decision on the mine by an independent person. In addition, alternative regimes must be approved by the Commonwealth Minister and could be rejected by the Commonwealth Parliament.

18. The Native Title Act, as amended by the Native Title Amendment Act, continued to protect native title rights and respected the Mabo and Wik decisions. It did not seek to undo the past or remedy the historic dispossession of indigenous people in Australia, but tried to provide some certainty about where there had been extinguishment and remedies for the future which would enable native title-holders to claim land, and, with the help of the Land Fund, to purchase land, notwithstanding extinguishment. As amended, the Act significantly limited any future extinguishment of native title and sought to incorporate native title rights into Australian law. It maintained much of the right to negotiate. It allowed claims to be made over 79 per cent of Australia, and a significant part of Australia had in fact been claimed in more than 880 claims currently being processed.

19. The Committee had raised the question of proposed changes to land rights law in Australia, which he took to mean the Northern Territory Aboriginal Land Rights Act. A report commissioned on that legislation had suggested making substantial changes to the Act. The Government would carefully consider the recommendations.

20. Concerning the Aboriginal and Torres Strait Islander Social Justice Commissioner, he observed that the functions of that position had not changed, but that, following a review of the work of the Human Rights and Equal Opportunity Commission, the Government had put forward legislation to restructure it, conferring the current functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner on the Commission as a whole. Other specialist positions would be dealt with in the same way. The Government's decision to abolish "portfolio-specific commissioners and confer their duties on more generalist deputy presidents was aimed at addressing the perception that the Commission was too focused on protecting those sections of the community for whom a specific commissioner existed, often to the detriment of other disadvantaged sections of the community. One of the deputy presidents would have responsibility for racial discrimination and social justice issues. The Government recognized the practical importance and symbolic significance of monitoring, educational and reporting functions in relation to the human rights of indigenous Australians and remained committed to ensuring that they could be effectively performed by the Commission.

21. The CHAIRMAN said that, in the light of the many communications received from non-governmental organizations (NGOs) and other groups, as well as from individuals, he was convinced that the Committee had been right to adopt its decision 1 (53).

22. Ms. McDOUGALL (Country Rapporteur) welcomed the detailed report of Australia and expressed her appreciation for the assistance and detailed submissions she had received from the Australian authorities. A number of NGO submissions had likewise been useful.

23. Australia's two largest groups of indigenous peoples, the Aboriginals and Torres Strait Islanders, together accounted for some two per cent of the country's total population of 18.3 million. The Aboriginals had lived in Australia for at least 50,000 years, while the Torres Strait Islanders had lived in the islands for around 10,000 years. Numbering between 300,000 and 1,000,000 at the time of European settlement in 1788, the Aboriginal population had dropped dramatically until the twentieth century as a result of the disease, displacement, repression, brutal treatment and socio-cultural disruption caused by the settlers. As many as 100,000 Aboriginal children - the "lost generation" - had been separated from their parents in order to be brought up with "civilized" values. Until 1967, the First Peoples of Australia had been denied citizenship and voting rights and had not even been counted in official censuses. Since then, however, serious steps had been taken by the Government to address the social, health and economic risks to the Aboriginal peoples, including, for example, the establishment of special agencies such as the Office of Aboriginal Affairs, the Aboriginal and Torres Strait Islander Commission and the Human Rights and Equal Opportunity Commission.

24. Despite those efforts, which the Committee welcomed, indigenous persons continued to fare dramatically worse than the non-indigenous population in the areas of health, education, housing, criminal justice, employment and job training, as the Government itself had acknowledged in its previous report.

25. Australia's land practices represented the worst example of racially motivated impairment of native rights. The doctrine of terra nullius had made it possible for settlers to obtain full legal recognition of their property rights, in complete disregard for Aboriginal interests and the cultural value of their traditional land distribution system. The nineteenth-century policy of "reserving" some land for indigenous people could not make up for the massive displacement of the continent's inhabitants from their homeland.

26. In 1992, in a landmark case, Mabo v. Queensland, the High Court had ruled that the terra nullius doctrine was unconstitutional and violated the Racial Discrimination Act of 1975, which had been enacted in part to fulfil Australia's obligations under the Convention. To undervalue indigenous law and custom while recognizing British common law property rights had been ruled unlawfully discriminatory. The Government had constantly justified its actions by invoking the standard of common law. Under that standard, however, native title was a vulnerable property right and other land titles were better protected against interference or forced alienation. Common law was therefore racially discriminatory. The response of the Australian Government to the Mabo decision had been to pass the Native Title Act 1993, which had established a system to recognize native title claims through the National Native Title Tribunal, a measure that the Committee had welcomed when it had considered Australia's previous report.

27. The original Act had allowed "validation" of prior land dealings that might have been invalid under the Racial Discrimination Act. Because such validation had been deemed racially discriminatory, the Act had provided two key protections for native title with respect to future land dealings: the "freehold standard", which required native title to be treated in the same way as freehold title, and a "right to negotiate" over certain land use in the future - notably mining. It was the inclusion of those protections for the future that had enabled indigenous groups to support the Act despite its discriminatory provisions relating to the past. In 1993, the Committee had accepted that the Act, described by Australia as a "special measure" under articles 1, 4 and 22, was compatible with the Convention.

28. Native title-holders had won another apparent victory in 1996, with a ruling in the Wik Peoples v. Queensland case that a government grant of pastoral lease did not necessarily extinguish native title over the area in question. However, the definition of valid extinguishment under the Act had remained unclear and, under pressure from, in particular, mining interests, Parliament had passed the Native Title Amendment Act 1998, a piece of legislation that had aroused strong criticism on the grounds that most of its provisions focused on the extinguishment and impairment of native title.

29. Notwithstanding the Government's arguments justifying the amendments, notably on grounds of its interpretation of the Wik case, she had concluded that the central goals and compromises underpinning the original Act - the protection and recognition of native title and the establishment of mechanisms affirming the Mabo decision - bore little relation to the amended Act, which appeared in many ways to wind back the protections offered by the Mabo and Wik decisions. The Wik decision appeared to hold that a pastoral lease did not necessarily extinguish native title; that native title could coexist with pastoral leases; and that, in a conflict between a pastoral lease and native title, the pastoral lease would prevail to the extent of the inconsistency. She asked whether that was a fair reading of the High Court decision. She also wondered why, given the limited nature of pastoral leases, the Wik decision should cause so much uncertainty.

30. A central question was whether the amended Act had unsettled the compromise between the rights of native title-holders and non-native title-holders reached in the original Act, giving greater weight to non-native title even with respect to future land uses. The four main criticisms of the amended Act related to the validation of otherwise invalid past acts; the "confirmation of extinguishment"; the primary production upgrade; and restriction of the right to negotiate. In addition, the amended Act set the registration test at a high threshold, which would probably make it more difficult for claimants to assert native title rights, including the right to negotiate future land use.

31. The amended Act validated certain encroachments on native title that had occurred between the date of the original Act and the Wik decision, despite the fact that many of those acts might have been invalid under the original Act and under Wik. Was it correct that many of the actions thus validated could have been invalid under Wik? Was it not fair to say that Wik required a case-by-case analysis rather than the blanket validation approach established in the amended Act, since, under Wik, non-native title prevailed over native

title only to the extent of the inconsistency? Had the Social Justice Commissioner not issued warnings that, if non-native title-holders acquired their rights after Mabo and the original Act without investigating the possibility of coexisting native title, they would do so at their own risk? Did the blanket retrospective validation not reward those who had ignored such warnings? Were the provisions not discriminatory in validating acts and providing for extinguishment only in relation to native title and not in relation to other forms of title - and with no countervailing benefit to be obtained on the basis of which the amendments could be considered "special measures" under the Convention?

32. The amended Act also contained provisions confirming and listing in a Schedule certain land holdings as "previous exclusive possession acts", which were deemed to extinguish all native title claims. Despite the Government's assertion that the aim of those provisions was to reflect common law but make lengthy case-by-case determination unnecessary, she believed that they in fact encroached on common law native title protections because, first, they deemed that certain tenures extinguished native title where at common law they would not; and second, such confirmed tenures extinguished native title for ever, regardless of whether the non-native tenure continued. That denial of any possibility of reversion of native title interests following the end of an exclusive possession lease appeared to go beyond the High Court's intentions in Wik: native title-holders could claim compensation but not ownership. Was reversion in fact possible, as the Government representative had appeared to indicate? The report stated that just terms compensation was assured where there had been no prior common law extinguishment and it gave an overall impression of minimal impact - only 7.7 per cent of Australia - but it appeared in fact to be a sweeping divestment of native rights.

33. Did the delegation agree with her assessment that the common law recognition of native title was itself discriminatory and therefore did not, on its own, comply with the Government's obligations under the Convention? Was it correct that Wik required at least a case-by-case analysis of what tenures were inconsistent with native title and to what degree, and that a clear legislative intention was required to extinguish native title? Did Wik not require the opposite of the blanket extinguishment of native title established under Schedule 4? She wondered how the Government saw the recent Miriuwung and Gajerrong case, in which a federal court in Western Australia had found that many titles listed in the Schedule to the amended Act did not extinguish native title at common law. If that decision was correct, would it not mean that the amendments had given rise to even greater discrimination and divestment than was the case under common law? What had been the nature of the consultation with indigenous peoples over which tenures were to be included in the Schedule? Was it correct that the effect of the provisions was solely to divest native title-holders while having no similar impact on non-native title-holders and how was that consistent with the Government's obligations under the Convention?

34. The amended Act allowed pastoral leaseholders to upgrade the range of primary production activities permitted on their leaseholds, regardless of the possible effect of such activities on coexisting native title interests and without the consent of a native title-holder. Since primary production activities involved far more intensive land use (logging or quarrying, for

example) than pastoral activities, and thus might transform the nature of the lease and reduce the possible extent of coexistence with native title, those provisions appeared to discriminate against native title-holders by granting unwarranted preference to the interests of non-native title-holders. Holders of non-native title property interests coexisting with pastoral leases would not be affected in the same way, since, as she understood it, primary production upgrades were not authorized on the land of non-native title-holders without their consent. According to the Social Justice Commissioner, the provisions seriously eroded the benchmark of equality central to the original Act; the expansion of pastoralists' rights and corresponding restriction of native title-holders' rights, together with the confirmation and validation provisions, would constitute the greatest single and explicit impairment of native title in Australian history. She asked what the Government's response was to that comment. She also inquired whether the primary production upgrade provisions did not eliminate the freehold standard guaranteed for the future under the original Act and return indigenous title-holders to the position of inequality.

35. The original Act had granted native title-holders the right to negotiate "permissible future acts" relating mainly to mining exploration and production and to the compulsory acquisition of the land by the Government for the benefit of a third party - a major compromise between native and non-native title-holders' interests. Far from merely streamlining or re-working the right to negotiate provisions, as claimed by the Government, the amended Act fundamentally altered the right by rescinding altogether the right to negotiate in certain circumstances, most importantly in relation to land exploration and mining activities and by allowing States and Territories to replace the right to negotiate with a lesser right of consultation and objection that did not require the Government to act in good faith; nor did it make the validity of the grant being sought subject to proper consultation. The right to consult and object was clearly a lesser procedural right.

36. The indigenous communities' consent had been critical to the legitimacy of the original Act. The Government report noted that, in developing its response to Wik, too, it had undertaken extensive consultation with all interest groups (para. 31). The Committee would welcome additional information concerning that consultation process in the light of conflicting information suggesting that indigenous representatives had been marginalized during the legislative process and had totally rejected the final legislation. A lack of effective participation by indigenous people in that process could be a cause for concern with respect to Australia's compliance with its obligations under the Convention. In its General Recommendation XXIII, on indigenous peoples, the Committee had stressed that no decisions directly relating to their rights and interests should be taken without their informed consent.

37. What steps had the Government taken to ensure the effective participation of indigenous peoples and had their "informal consent" been obtained? How had the Government determined that their interests were adequately incorporated given that the Social Justice Commissioner, the Aboriginal and Torres Strait Islands Commission and the National Indigenous Working Group had opposed the amended legislation?

38. One of the omissions in the report was the failure to provide an explicit analysis of the compatibility of the amended Act with Australia's obligations under the Convention, although it did state that the new Act must be construed subject to the provisions of the 1975 Racial Discrimination Act (RDA). Australia must be commended for incorporating the provisions of the Convention into domestic legislation through the RDA. However, the principle of parliamentary sovereignty made the provisions of the RDA inferior to subsequent conflicting legislation of the Federal Parliament, including the original and the amended Native Title Act, and State legislation authorized by the amended Act was also immune from challenge based on the RDA. She based that view on the High Court's decision in the case of Western Australia v. Commonwealth that "the general provisions of the Racial Discrimination Act must yield to the specific provisions of the Native Title Act in order to allow those provision a scope for operation", a ruling reached in spite of section 7 of the Act intended to ensure that the RDA would be controlling in the interpretation of the Native Title Act. An amendment that would have effectively given the provisions of the Racial Discrimination Act precedence over those of the Native Title Act had not been adopted, meaning that where the Act authorized activities in conflict with the RDA, those activities would be valid under Australian law, even though they breached Australia's international obligations.

39. What was the legal effect of the High Court's decision in the Western Australia v. Commonwealth case? Could the delegation comment on the statement in the Australian Government's submission that nothing in the Native Title Act as amended affected the operation of the RDA, and on her understanding that section 7 of the amended Act might not provide protection against discrimination where a provision of the amended Act or legislation authorized by it discriminated against native title-holders? How did the Government define "substantive equality" as opposed to "formal equality" and did the Government consider that the Convention did not require substantive equality? What was the Government's definition of a "special measure" as provided for under articles 1.4 and 2.2 of the Convention and how would that apply to the amended Act? One stated reason for amending the Native Title Act had been to create legal certainty after the Wik decision; could that not have been done by favouring native title over non-native title? Why was it that in every case the discrimination was against Aboriginal claims and in favour of other interests?

40. Regarding the proposed replacement of the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Race Discrimination Commissioner by a deputy president of the Human Rights and Equal Opportunity Commission, would the latter's budget and powers be equivalent to those currently allocated to the two separate posts? What justification was there for any reduction in authority and resources in so important an area? She noted that a new Social Justice Commissioner had just been appointed but the Acting Social Justice Commissioner, in her submission to the Committee, had observed that "given the continued disproportionate rate of indigenous incarceration, the disproportionate numbers of Aboriginal and Torres Strait Islander people who die in police and prison custody, [and] the chronic and distinct disadvantage of Indigenous Australians as demonstrated by all social indicators, it may be considered that the continued existence of an appropriately qualified, specialist position to report on the exercise and

enjoyment of human rights by Aboriginal and Torres Strait Islander people falls within the characterization of a special measure required to comply with Australia's obligations under [the Convention]". A comment on that observation in the light of the legislation currently being passed would be welcome.

41. Mr. Sherifis took the Chair.

42. Mr. DIACONU said that the difficulties adduced in paragraphs 26 to 29 of the report as justification for amending the Native Title Act had been mainly technical, and none were the fault of the indigenous people. The purpose of the amended Act was in fact not to remedy the technical difficulties but to ensure certainty and the enforceability of acts potentially rendered invalid because of the existence of native title; in other words, it protected the claims of other groups to maintain the validity of their title to property when it ran counter to native title. The criteria for the registration of titles were exorbitant; indigenous persons had to show that they could establish property rights and prove that those rights had not meanwhile been infringed by other means. Negative proof was very difficult to establish in law.

43. Regarding confirmation of title (paras. 37 to 40), any previous change in title could lead to the extinguishment of a claim, and that included use at any time under residential, pastoral, commercial or community leases. Was the 21 per cent of land excluded by the confirmation regime the area in which indigenous populations actually lived and had their cultural links? If the 79 per cent potentially claimable was desert area, the offer was not a just one. The figures in paragraph 59 (ii) on coexisting native title on pastoral leases - over 40 per cent of Australia's landmass - further limited indigenous people's claims and their right to land use. He would like clarification of the geographical issues involved.

44. Regarding agreements on use of native title land, all agreements were permitted, even those which led to the extinguishment of native title. It was too easy to conclude such agreements and thus lose native title. Was it not possible to protect indigenous persons from concluding such agreements? In Europe, for instance, the Sami held property under community title and therefore one individual could not sell property but required the agreement of the entire community, which effectively protected the community's land tenure.

45. Regarding competing claims between indigenous and non-indigenous persons, the Act increased the inequalities between the different groups. To what extent were the traditional rights of indigenous people affected by the provisions of the Act? That was the Committee's starting point: the special relationship between the Aboriginals, their culture and way of life, and the land. Native property rights should not simply be given the same protection as any other property rights but should be subject to special protection measures; anything else was tantamount to not protecting them. What did paragraph 55 mean by stating that States and Territories could replace the right to negotiate with "their own regimes", bearing in mind that the right to negotiate afforded protection not provided by procedural rights? A new balance needed to be struck between all rights and interests in Australia. Perhaps renewed negotiations with the Aboriginal community would be necessary

in order to review the Act and its procedures for implementation so as to find a balance which would also protect the rights of the Aboriginal. The Aboriginal people only asked that all laws and their provisions should be neither discriminatory in intention nor in fact against the Aboriginal population.

46. Mr. BANTON said that he would confine his comments to consideration of whether anything in the amendments to the Native Title Act constituted a violation of the State party's obligations under articles 2 and 5 of the Convention, proceeding from the premise that Aboriginal land rights derived from the pre-colonial period and were recognized at common law and could validly be extinguished. Those rights were now recognized in international norms. Moreover, a Canadian precedent suggested that there might be a common law obligation upon a Government to act in good faith and in the best interests of its indigenous peoples. Aboriginal Australians might have a right to effective participation in decision-making about their rights, in accordance with article 2.1 (c) and (e) of the Convention and the Committee's General Recommendations XXI and XXIII. The Aboriginal and Torres Strait Islander Commission and others had maintained that the national interest entailed the protection of the indigenous heritage; if that claim was not accepted he would like to know the reasons for rejecting it. The question of possible violation was immediate; in August 1998 the Queensland Government had extinguished in perpetuity possible native title over 12 per cent of the State's territory.

47. On the right to negotiate, some of the changes required more justification, such as the removal of the right with respect to the intertidal zone, the granting of mining rights by governments and the provisions for expediting government approval for changes in land use. Some future acts concerning primary production, management of waters and airspace, renewal and extensions, reservations and leases and facilities for services to the public, would be valid without any right to negotiate. The restriction of claims to those already on the register was a significant restriction of the right to negotiate. Those were serious diminutions of a common law right protected by international law, and they failed to recognize substantive rights. Some of the changes might be improvements but much would depend on the interpretation of statutes and rules; the major change was that the indigenous peoples no longer trusted in the Government's good faith.

48. Provisions for the validation of intermediate-period acts appeared to be formally discriminatory in that they bore only upon native title and not upon other cases of potential invalidity. The powers conferred upon the governments by the amended Act were greater than those needed to implement the Wik decision, embodied new policies and prevented any revival of native title on the expiry of a non-exclusive tenure. He had heard that in New South Wales time limits were being imposed for the registration of claims, which made it difficult for claimants to have the necessary investigations carried out to obtain evidence for native title. The "confirmation of extinguishment" provisions failed to accord native title-holders equality before the law since they bore only upon indigenous persons and affected titles that could well have been left undisturbed, such as those listed in the document submitted by the Australians for Native Title and Reconciliation (ANTAR) movement.

49. The definition of primary production purposes was very broad and apparently included no meaningful requirements for consultation or negotiation with native title-holders. He would welcome comments on the ANTAR claims (p. 25, para. 3 of the ANTAR submission), that primary production provisions discriminated against native title-holders in terms of prior consent for the granting of grazing or irrigation rights.

50. Apparently 60 per cent of the aboriginal population would be unable to register any claims. The Aboriginals' ancestral land rights had already been extinguished. In those circumstances, the compatibility of the amendments with Australia's obligations under the Convention was questionable.

51. Mr. YUTZIS said that the volume of documentation available to the Committee showed the importance of the issue, which should be considered not only from the legal standpoint but also in the context of the suffering endured by the Aboriginal people in the past and their continued vulnerability today, as evidenced by the number of Aboriginals in prisons and the difficulties which they, like other vulnerable groups the world over, had in asserting their rights and proving their claims. Paragraph 29 of the report acknowledged that Aboriginal representative bodies were unable to deal with subjects affecting them, on account of their lack of explicit powers and functions.

52. Regarding the issue of coexisting native title, the Australian representative had referred to coexisting interests rather than coexisting rights; which prevailed, rights or interests? Paragraph 57 mentioned indigenous groups' concern that pastoral lessees might attempt to prevent native title claimants from continuing access to the lessee's land for conducting traditional activities, and stated that, conversely, some pastoralists were concerned that native title claimants with no prior access would try to gain access despite having a weak claim. Without prejudging the issue, he said that the paragraph showed an imbalance between the situation of pastoral lessees and that of native title claimants - a recurring problem throughout the report. There was too much emphasis on requests for proof of title for registration, with registration requirements weighted against native title. He drew the State party's attention to paragraph 5 of the Committee's General Recommendation on the rights of indigenous peoples and requested details of the measures being taken to comply with that obligation.

53. Turning to the role of the Social Justice Commissioner, he noted that another structure was being created to deal with the same issues; had the indigenous institutions been consulted, why was the State apparently making a unilateral decision, and what had been the reasons for such a decision?

54. Mr LECHUGA HEVIA said that the amendment to the existing legislation governing the indigenous population of Australia had major implications for their way of life, livelihood and traditional land rights. The Government's claim that the Aboriginal population would benefit from the Native Title Amendment Act 1998 was rejected by the indigenous people themselves. He asked the delegation to comment in general terms on NGO allegations that the Act, as amended, had undermined certain advantages acquired by the Aboriginal population in recent years and upset the balance between indigenous and non-indigenous interests to the benefit of the latter. To what extent had

indigenous access to traditional land forming part of their ancestral heritage been curtailed? By all accounts, the Aboriginal population had not been properly consulted on the amendments to the Native Title Act, which had allegedly been weighted in favour of non-native title-holders. The Committee had received communications from two Members of Parliament representing the opposition Labour Party who considered that the new measures were racially discriminatory.

55. Mr. VALENCIA RODRÍGUEZ said it was understandable that the Native Title Amendment Act should arouse strong emotions in Australia's indigenous population, which had now been rendered more vulnerable. He associated himself with the comments of the Country Rapporteur and other members of the Committee.

56. Ms. ZOU Dexi said that the initial impression she had received from NGO material was that the Australian Government was pursuing a retrogressive policy. The indigenous population was being deprived through legislation of rights it had previously enjoyed. She gathered from the media that the "One Nation" political party openly advocated racial discrimination and xenophobia. Such conduct was a flagrant breach of the Convention and called for strong action by the Government against such manifestations of racism and xenophobia and in defence of its victims.

57. Ms. SADIQ ALI said that the Committee linked the obligation of non-discriminatory respect for indigenous culture to the question of control over land. She appealed to the Australian authorities to negotiate an amicable settlement to the issue.

58. Mr. GOLEDZINOWSKI (Australia) said that the Special Rapporteur of the Sub-Commission, addressing the United Nations General Assembly in November 1998, had drawn attention to the setback experienced by the "One Nation" party, whose leader had lost her seat in the Australian Federal Parliament in the October 1998 elections. He had welcomed the efforts by the population of Queensland and the Federal Government to reduce the influence of the party, which opposed the official policy of multiculturalism and ethnic and cultural diversity. Immediately after the elections, the Australian Prime Minister had undertaken to promote an authentic reconciliation with the Aboriginal population in the context of the centenary celebrations of the Australian Federation. A new ministerial portfolio with responsibility for reconciliation had been created to that effect. The Government had also established a National Multicultural Advisory Council and launched a "Living in Harmony" programme designed to support community awareness of racial, cultural, social and religious diversity.

59. Mr. ORR (Australia) said that he would address the Committee's general concerns before replying to specific questions at the next meeting.

60. Articles 2 and 5 of the Convention were interpreted in Australia as placing a twofold obligation on States parties: to prohibit racial discrimination and guarantee equality, and to take temporary affirmative action when circumstances so warranted in order to ensure racial equality. However, judgements concerning analogous circumstances and the appropriateness of different treatment could only be made on a case-by-case basis.

International law, as understood by Australia, recognized that fact by according States a margin of appreciation in their implementation of principles of non-discrimination. However, the margin of appreciation in cases of racial discrimination was narrow. In Australia's view, the recognition of common-law native title rights more than 200 years after the settlement of the country was a field in which some margin of appreciation, especially in regard to historical actions, was permissible. He would address the issue as to whether Australia could undo discriminatory actions that had occurred during the period between settlement and the 1992 Mabo decision at the next meeting.

61. Australia was aware of the importance, from the point of view of its obligations under the Convention, of ensuring that decisions regarding treatment, for example under the Native Title Amendment Act, were not arbitrary but had an objectively justifiable aim and used proportionate means. The Convention had been incorporated into domestic legislation through the 1975 Racial Discrimination Act. Australia's interpretation of that Act was informed by but not dependent on international law. It placed more emphasis on formal equality than substantive equality, the only exception being cases where special measures were appropriate. As a result, there was some divergence between the two approaches in the Australian judicial system.

62. The fact that the Native Title Amendment Act dealt primarily with native title rights, i.e. land and water rights arising from the traditional laws of Australia's indigenous people as recognized by common law, and not with the rights of others with land and water interests under common law or statute law, did not, in Australia's view, make the Act discriminatory. Rather, it was necessary to examine the overall substantive impact of the original and amended Native Title Acts and other relevant legislation and the balance that had been struck between various rights and interests. It should be recognized that past acts, however discriminatory, could not be undone, although their impact could be mitigated by present and future policies.

63. The Government had attempted, following the Wik decision, to obtain some form of consensus on reconsideration of the Native Title Act. It had consulted stakeholders, including indigenous representatives, published its proposals, sought and considered comments at a number of stages, and allowed extensive parliamentary debate. It had accepted a large number of amendments to the bill, many taking into account comments by the opposition, minor parties and indigenous representatives. The final version had not met the concerns of the indigenous representatives but it had also failed to meet the concerns of other stakeholders such as pastoralists, miners and some States and Territories.

64. He agreed with the Country Rapporteur's summary of the Wik decision. Pastoral leases were a traditional form of grant by the Government. While it had previously been assumed that such grants extinguished native title rights, the High Court had ruled that they did not necessarily extinguish all such rights. The Government's assumption that pastoral leases did not extinguish native title was actually more generous than the Wik decision. The Government also took the position that native title could coexist with pastoral leases. He agreed with the Country Rapporteur that, where there was a conflict between the rights of pastoralists and those of native title-holders, the former

prevailed but only to the extent of the inconsistency. It was difficult to establish, however, what the implications were for particular pastoral leases and native title-holders. The rights of a pastoral lessee were not always clearly identifiable from the lease. They varied considerably from one part of the country to another because responsibility for land law lay with the States and Territories rather than with the Commonwealth Government. At all events, although the High Court and common-law position was that the rights of pastoral lessees prevailed, that was not necessarily the position adopted in the Native Title Act itself. It had been argued that the Act had reversed the previous position and accorded priority to native title-holders. In the Governmert's view, the Wik decision had created considerable confusion regarding the rights of pastoral lessees and native title-holders where the two coexisted. One of the purposes of the Native Title Amendment Act had been to clarify the situation.

The meeting rose at 6 p.m.